Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

RONALD MOSKOWITZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Dated: May 19, 2005

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QUESTIONS PRESENTED

I. Could reasonable jurists differ (and thus a Certificate of Appealability issue allowing appellate review of the district court's denial of petitioner's collateral claim of ineffective assistance of counsel), where denial of petitioner's ineffective-counsel claim was based on the District Court's ruling that the repeated and numerous procedural and evidentiary mistakes of counsel during the criminal trial "might be considered sound trial strategy [and] do not constitute ineffective assistance?"

II. Where the repeated errors of trial counsel were denounced by the trial judge as they repeatedly occurred during the criminal trial, is it consistent with Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) to later, in the habeas proceeding that followed, to immunize those errors on the ground that the court should not "second guess trial counsel's sound trial strategy?"

III. Should the courts below have considered the effect of this Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004) on the viability of the criminal conviction and on the amount of legitimate evidence pointing to petitioner's guilt (in assessing whether trial counsel's mistakes prejudiced petitioner in light of the evidence against him) where his original conviction was based in significant part on a codefendant's uncross-examined plea-allocution of the very kind denounced later in Crawford, and where petitioner, on direct appeal to the Second Circuit, specifically but unsuccessfully raised the Crawford claim, but that claim was denied in an opinion later specifically overruled by Crawford?

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OPINIONS BELOW

The judgment of the United States Court for the Second Circuit, entered on February 18, 2005, denying petitioner's motion for a Certificate of Appealability to allow review of the District Court's order denying petitioner's ineffective assistance of counsel claim, is reproduced at the Appendix ("App.") at App. 1a. The Order of the District Court denying petitioner's claim of ineffective assistance of counsel, entered on July 15, 2004, is reproduced at App. 3a-13a. The previous Order of the District Court, entered September 24, 2002, which denied petitioner's ineffective counsel claims on a ground that later prompted remand from the Second Circuit, and which was, after remand, adopted in the District Court's Order of July 15, 2004 that forms the basis for this petition, is reproduced at App.14a-24a.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals denying the Motion for a Certificate of Appealability by which petitioner sought review of the District Court's denial of his ineffective-counsel claim was entered on February 18, 2005. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 2254.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part that:

> In all criminal prosecutions, the accused shall enjoy the right to be represented by counsel ...

Title 28 U.S.C. § 2255 provides in pertinent part:

> A prisoner in custody under a sentence of a Court established by an Act of Congress, claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or the laws of the United States ... may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

STATEMENT OF THE CASE

Summary of The 2255 Claim

Petitioner Ronald Moskowitz was indicted in the United States District Court for the Southern District of New York for various counts of fraud relating to his alleged manipulation of the stock prices of a company, Ferrofluidics, of which he was a major shareholder, Chairman of the Board of Directors, and President. He was convicted on two counts and sentence to serve a prison term of 97 months.

The criminal trial involved sophisticated issues of securities fraud set in a complicated factual context. Held in the Southern District of New York, it should have been defended with the high competence level enjoyed in that District. Yet it was not. Moskowitz brought this proceeding below, under section 2255, claiming that the performance of his trial counsel was substandard by any fair measure, in any District. The District Court's frequent and serious complaints about trial counsel's performance form the basis of this claim. The extraordinary record of those mistakes is summarized below.

Moskowitz contends that a full appeal of the District Court's denial of his 2255 claim should have been allowed, pursuant to 28 U.S.C. § 2253(C)(2), which authorizes a Certificate of Appealability, where "reasonable jurists could debate whether ... the petition should have been resolved in a different manner ..." Slack v. McDaniel, 529 U.S. 473, 484 (2000). At its core, Moskowitz's challenge to the District Court's denial of his 2255 claim is that, in holding that trial counsel's actions were immunized as "sound trial tactics" that should not be "second guessed," the decision below took this Court's reasoned deference to tactical decisions of trial counsel, made in the heat of the trial, and created from that deference a hole so wide that virtually any mistake can escape scrutiny even if it cannot even remotely be said to have been part of any tactical decision.

Procedural History

Moskowitz's two-count conviction was affirmed on direct appeal in United States v. Moskowitz, 215 F.3d 265 (2d Cir. 2000) cert denied 531 U.S. 1014 (2000). In that appeal, Moskowitz's principal argument was that it violated his right to confront witnesses against him when the District Court allowed the prosecution to read to the jury the un-cross-examined plea allocution made by a co-defendant, in which that co-defendant confessed to have conspired to manipulate the stock prices with "an officer of the company." In affirming, the Second Circuit noted that Moskowitz's Bruton[1] objection to the use of this plea allocution was fully overcome by Evidence Rule 804(3), as a declaration against penal interests of the confessing co-defendant. In further ruling that it was likewise not Bruton error for the prosecutor to have been allowed to argue in closing that the "officer" referred to in the un-cross-examined statement of the co-defendant was indeed petitioner, the Court of Appeals held that petitioner's trial counsel had invited this argument because of the "outrageous" way he had attempted to distort the meaning of this confession in his closing argument. The result was that the very last argument made by the prosecution in closing was, "look to the plea of the co-conspirator," an argument at the heart of what Bruton forbids. As shown below, this blunder was

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[1] Bruton v. United States, 391 U.S. 123 (1968), which holds that the out-of-court confessions of a co-defendant may not, consistent with the Sixth Amendment's Confrontation Clause, be admitted against another co-defendant unless the latter co-defendant has the ability to cross-examine.

by no means the only one made by counsel, or even merely part of a short list.

After affirmance by direct appeal and denial of certiorari by this Court, petitioner filed his 2255 motion claiming that his trial counsel had been ineffective. The District Court denied that motion by a Memorandum Opinion dated September 23, 2002. (App. 15a) Part of the reason for the denial of the Moskowitz's initial 2255 motion was the District Court's ruling that, because the complaints about trial counsel's performance were record-based (that is, manifest in the trial transcript), they were waived because they were not presented on his direct appeal, citing Billy-Eko v. United States, 8 F.3d 111, 115 (2d Cir. 1993).

Moskowitz appealed from that denial of his 2255 claim, and while that appeal was pending, the Supreme Court overruled Billy-Eko and other cases like it by holding that whether an ineffective-counsel claim could have been brought on direct appeal, it may be brought later by way of a motion under 28 U.S.C. § 2255. See, Massaro v. United States, 538 U.S. 500, 509 (2003). Based on Massaro, the Second Circuit remanded this case to the District Court for determination of whether the record-based conduct of trial counsel had been ineffective. The District Court then ruled that the conduct was not ineffective and again denied Moskowitz's 2255 motion and refused to issue a Certificate of Appealability. (App. 13a) The Second Circuit likewise refused such a Certificate (App. 1a) and this petition follows.

REASONS FOR GRANTING THE WRIT

The decision below ignores the balance mandated by this Court in cases scrutinizing claims of ineffective assistance of counsel. In so doing it invites future courts to ignore that settled law. For 20 years, Circuit Courts have all viewed Strickland in the same light:

> A defendant has a Sixth Amendment right not just to counsel, but to "reasonably effective assistance" of counsel. [citing Strickland v. Washington] To gain relief for a violation of this right, a defendant must show both unprofessional conduct and, in most cases, prejudice as a result. More precisely, the claimant must show that (1) his or her attorney's performance was, under all the circumstances, unreasonable under prevailing professional norms, (citation omitted) and ... that (2) there is a "reasonable probability that, but for counsel's unprofessional errors, the result would have been different"

United States v. Day, 969 F.2d 39, 42 (3d Cir. 1992); see also, Lindstadt v. Keane, 239 F.3d 191, 204 (2d Cir. 2001).

Strickland's formulation has struck the proper balance between the Sixth Amendment's promise of effective assistance of counsel and the desire for finality of criminal judgments entered after a fair trial. That balance insists that while genuine errors that undermine confidence in the outcome warrant

a new trial (if they prejudiced defendant), tactical judgments made in the heat of battle, even if not in hindsight the best course to have chosen, are entitled to a "strong presumption" "because of the difficulties inherent in eliminating the distorting effects of hindsight." Strickland, supra, 466 U.S. at 689, 104 S.Ct. 2052. Without this deference, every trial will be followed by Monday-morning quarterbacking in which all of those tactical judgments, made on the spot as part of trial counsel's perception of how they will advance his planned defense, will be "second-guessed."

However, the presumption stated in Strickland simply had nothing to do with the blunders occurring at Moskowitz's trial. There was nothing tactical about the mistakes; no judgment call. They were simply blunders showing the manifest unpreparedness of counsel for the challenge of defending a securities-fraud case in the fast track of the Southern District of New York, or for that matter, in any federal court.

If the decision below is allowed to stand, along with the overly tolerant attitude it signals concerning clear blunders, Strickland's balance will disappear and convictions will be left to stand despite serious errors since those errors will have become immunized. Strickland is too good a balance and has fairly guided inquiries into counsel's performance for too long to be jettisoned by the "anything goes" attitude used below to label as "sound trial tactics" blunders so obvious and embarrassing that they have no place in any court, much less in the federal district court trying a complex case of securities fraud.

Of course, even if we are sustained (as we should be) on the nature of the mistakes shown below,

Strickland also requires a showing that the mistakes prejudiced the defendant, meaning that without them, there is a reasonable likelihood that the outcome may have been different. That matter should either be (1) obvious from the nature and quantity of the mistakes, or (2) should be referred back to the Courts below with an instruction to revisit their obviously casual treatment of that issue with a better understanding of the serious and non-tactical nature of the mistakes involved. If there is such an inquiry, we submit that the Courts below should be instructed to view the evidence/prejudice question, considering Crawford, supra, and its mandate that the centrally-relevant, highly-touted co-conspirator confession of co-defendant Kirk, be fully excised.

ARGUMENT

I. Counsel's Errors Were So Troublesome That By The End They Had Literally Provoked The District Court

A fair reading of the quotes which follow show that we do not rely at all on "the distorting effect of hindsight" (Strickland, supra, 466 U.S. 689, 104 S.Ct. 2052). Instead we cite only the disparaging comments made by the District Court at the time of counsel's errors. While the District Court later (on this 2255) radically alters its view by calling "sound trial strategy" (App. 5a), that is simply not what happened and not what the District Court said during trial. The mistakes as seen through the eyes of the District Court at the time it repeatedly complained about them finally led the District

Court to a make a very caustic criticism of counsel's inabilities:

> COUNSEL: I don't understand how the statement rehabilitates Mr. Thorpe ... THE COURT: For the record, you have expressed your inability to understand. Now, what else do you want? [Tr. 199-200] COUNSEL: I don't know the identity of the person I may call, that is correct. THE COURT: Are you going through the telephone directory to find somebody? COUNSEL: I don't know who the person is. It is a possible character witness. THE COURT: Negative or positive? COUNSEL: Positive. THE COURT: This is one of the few cases in which you have to ask that question. [Tr. 6210] COUNSEL: ... we are getting into mistrial areas. THE COURT: Please don't hand me that gas.

[Tr. 909.][2] (emphasis added).

These remarks are surely extraordinary, occurring, as the District Court itself put it, in "few cases." Yet the District Court's derision of defense counsel was the inevitable culmination of a trial performance that reads like fingernails scraping a blackboard.

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[2] Numbers in brackets following "Tr." refer to pages of the trial transcript that will be part of the record if this Court grants review.

II. Counsel Failed In All Trial Fundamentals

At least until the complete amnesty for mistakes announced in the opinion here challenged, ineffectiveness could result from "unfamiliarity of trial procedure," United States ex rel. Williams v. Brown, 721 F.2d 1115, 1120 (7th Cir. 1983). Counsel repeatedly showed such unfamiliarity.

A. Counsel's General Inability To Question Witnesses

> THE COURT: How many more swings do you want to take before you ask a real question? ... Stop dancing with it. [Tr. 5853] THE COURT: Excuse me. Can you move this along, please. [Tr. 1661] ... THE COURT: He can't testify to that ... Please move on. [Tr. 1674] THE COURT: Can you move this along, ... please. [Tr. 1678] ... THE COURT: Are you asking him if he can read? ... Move on. [Tr. 1722] ... THE COURT: That has already been covered. Please move on. [Tr. 2963] THE COURT: Sustained. Stricken. Move on to something else. Four strikes and you're out, [Tr. 5854] ... THE COURT: What's the point of this? [Tr. 3154] ... THE COURT: Move this along, please ... Move on, please. [Tr. 3110] ... THE COURT: Try listening ... He gives the testimony; you ask the questions. Understood? [Tr. 1975] ... THE COURT: Sustained. You ask the questions. He gives the answers. [Tr. 2970]

B. Counsel's Substandard Direct and Cross-Examinations

> THE COURT: Either do it the right way or there will be an instruction to the jury that in considering the witness' credibility, they may consider the way the lawyer suggests questions and his answers. Do you want that? ... Then stop it. [Tr. 5748] THE COURT: ... one of the benefits that most lawyers see in cross-examination is the ability to ask leading questions. Have you considered doing that? ... Why don't you focus him on what you think is in the documents, instead of asking generalized, open-ended, mind-numbing questions. [Tr. 3137]. THE COURT: Cross-examination is supposed to be a commando raid, not a scenic railway tour ... So far we have had an hour of cross-examination, 10 minutes of useful information, including the fact that he puffed his resume. [Tr. 723.] (emphasis added).

C. Counsel's Failure To Lay Proper Foundations

THE COURT: The next time you try anything like that, I am going to gut you in front of the jury. Do you understand that? Do you understand that? COUNSEL: Can you tell me what the problem is? THE COURT: This witness cannot conceivably validate a letter from a hotel to a criminal investigator on the date your client stayed at the hotel. COUNSEL: Your Honor, it has the phone number of the hotel. He doesn't recall. THE COURT: He can't validate that and you know it. You can establish that through another witness. [Tr. 1726] THE COURT: Can we get something square, as a point of evidence. Simply because one exhibit has on it a number that is the same as the number on another exhibit that is in evidence, doesn't get the first exhibit in. Clear? ... It doesn't happen with tables, it doesn't happen with letters to your investigator, doesn't happen. Clear? ... Please don't try it. [Tr. 1729-30; 1744] THE COURT: You can't assume facts not in evidence and ask questions as if they exist. Is that news to you? [Tr. 3540]: TRIAL COUNSEL: Objection, your Honor, foundation. THE COURT: Please. [Tr. 4480]

D. Counsel's Failure With The Hearsay Rule

> COUNSEL: This is hearsay. THE COURT: Save the histrionics. [Tr. 182-183] ... THE COURT: Is there an acoustics problem here? I said it's not coming in for the truth. [Tr. 3834-5]

E. Neglect on a Key Jury Instruction

Counsel proposed a jury instruction on a key defense point, namely, that there is a vast difference between representation of fact and statement of opinion. Yet he bungled the process for securing that instruction at trial and for obtaining review of the issue on appeal:

> At the charge conference ... he never requested that this language be used ... Nor did Moskowitz take exception to the standard charge given to the jury.

Having failed to object, Moskowitz cannot now claim error. See Fed. R. Crim. Pro. 30. [Moskowitz, supra, 215 F.3d at 271.] This rule is well known. This obvious and fundamental error was downplayed by the District Court, citing this Court's opinion, as follows: "It is hardly clear that Moskowitz's draft charge accurately represented the law in every respect." (App. 10a Yet that something is hardly clear sure does not equate with a finding that reasonable jurist might differ, the standard for allowing the appeal.

F. Counsel's Credibility Problem

Perhaps worst of all, the counsel's performance was such that by the end of the case, the District Court expressed open doubts about counsel's integrity:

> THE COURT: I got half truths about Mr. Avery's testimony and quite frankly they were half truths that would irritate anybody who reads the other half. COUNSEL: If there comes an issue about what you were told about Mr. Avery's testimony ... THE COURT: I am talking about what I was told by you. [Tr. 3241-42] (emphasis added).

It no less than defies Strickland to call the just-summarized performance the "hallmark of zealous defense advocacy." [Gov. Op. at 43.]

G. The Errors Related To Co-Conspirator Jan Kirk

Jan Kirk was an alleged co-conspirator who pleaded guilty to both fraud and perjury. His testimony was vital to Moskowitz's defense, and Moskowitz asked his attorney repeatedly to seek Kirk's testimony. Kirk was, in the vernacular, quite a piece of work. After being hired by Moskowitz to work at Ferrofluidics, he did (and later admitted that he had done) most of the things Moskowitz was accused in the indictment of doing. He then anonymously wrote to the SEC that Moskowitz was

the wrong-doer.[3] A public SEC investigation and then grand jury investigation ensued, with Jan Kirk frequently meeting with the prosecutors, initially as their darling, to help them build their case against Moskowitz for the matters about which Kirk had anonymously written to the SEC.

Ultimately, however, the prosecutors determined that Kirk had lied, and had tried to persuade two other witnesses to blame Moskowitz for frauds that Kirk himself had perpetrated. [These frauds, the so-called sham private placements, were charged against Moskowitz in the indictment.] After Kirk's lies were discovered, the prosecutors simply moved Kirk to the other side of the chess board, indicting him as a co-conspirator of Moskowitz, and then using his wrong-doing as the center of the prosecution against Moskowitz. The prosecutors repeatedly told the jury that Kirk was Moskowitz's "main cohort" [Tr. 24] and his "main right-hand guy that I spoke to you about before, Jan Kirk." [Tr. 39-40.]

Using the co-conspirator rule, the prosecutors introduced all the evidence of Kirk's wrong-doing against Moskowitz. They then linked Moskowitz to that evidence by admitting Kirk's guilty plea allocution in a way that clearly pointed an uncross-examined finger at Moskowitz but which, quite unfairly, did not allow Moskowitz the opportunity to

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[3] Kirk sent five separate letters (Tr. Exhibits 3502-25) to the SEC accusing Moskowitz of all manner of wrong doing and saying: "the only honest managers there are Jan Kirk, Richard Groberg, and Steve Morin." [Kirk Letter to SEC, 7/3/93.] A private investigation Moskowitz had commissioned before the trial showed that Kirk had engaged in this form of treachery at his prior two jobs, where he came in a second in charge, then rigged matters against the person in charge, replacing him after the fall. He was literally a corporate "black widow."

call Kirk as a witness and show that Kirk had done the bad deeds himself and then later blamed Moskowitz for them as part of his scheme to take over the company, as Kirk had done in past jobs. While use of this guilty plea was affirmed on Moskowitz's direct appeal, Moskowitz, supra, 215 F.2d 265, this should not have been. See Crawford v. Washington, supra, 124 S.Ct. 1354, which overruled this Circuit's decision in Moskowitz, along with other cases that had affirmed the use of uncross-examined plea allocutions, by holding that the contents of these plea allocutions actually create the most acute need for cross-examination. Kirk's plea therefore can no longer be toted up in the mix of evidence from which the Courts below can find lack of prejudice. It must be read out of the case altogether.

Kirk's guilty plea was surely the lynchpin against Moskowitz. The prosecutors said so to the District Court when they offered the plea into evidence:

> The Indictment in this case charges Moskowitz with agreeing with Kirk to arrange for the sham sale of 620,000 shares of Ferrofludic stock, with approving Kirk's sham sale ... with filing a fraudulent registration statement registering the 620,000 shares, ... with reselling the sham private placement stock ... and with making false statements to the auditors ... regarding the placement. Each of the same charges is contained in the Kirk indictment and Kirk admits to them in the guilty plea allocution. Thus Kirk's statements are extremely

> probative of the existence of those same elements charged in the Moskowitz indictment.

[Government Letter to Court, dated October 24, 1998.] Later, and indeed in the last words said to the jury by the prosecutor, the jurors were told in high dudgeon to "look at the [Kirk] guilty plea." [Record on Direct Appeal, pp. 1082-84.]

This link with Kirk's wrongdoing surely took. As the Second Circuit itself summarized the important evidence against Moskowitz, it was all linked to Kirk:

> Moskowitz and Kirk executed a series of frauds designed to artificially inflate share prices [by] ... paying off an investment reporter and stock analyst to talk up the company; executing a sham private placement in which Moskowitz and Kirk found complicit or unknowing buyers who actually invested no capital in the corporation; executing a sham $12 million purchase order to inflate expectations; falsifying the public accounts to reflect these and other scams.

[Moskowitz, supra, 215 F.3d at 268.](emphasis added).[4]

We emphasize here in a summary way (with the request for a plenary appeal to elaborate) that Kirk was the proven wrong-doer and that the case

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[4] The District Court made the same link between Moskowitz and Kirk, verbatim. (App. 16a.)

against Moskowitz was co-conspirator derivative of that guilt. The three sham-private-placement witnesses, for example, testified that they dealt only with Kirk and did not know Moskowitz. Kirk was also directly responsible for the Kaiwa Hong Kong "sham purchase order" by which Ferro was able to announce to the public that it had sold 20 "crystal pullers" for $12,000,000.00. [Id.] When Kaiwa later backed out, this announcement was labeled a fraud to raise stock prices. Yet it was all arranged by Kirk.[5]

After proving Kirk's front-line position in both the private placement and the Kaiwa-Hong Kong shams, the prosecution successfully linked Moskowitz to these major prongs of the conspiracy by use of the jury instruction that "a defendant need not know all of the activities of the conspiracy ... a defendant need not know all the co-conspirators." [Tr. 6746-47.] This, along with Kirk's plea allocution, sealed the criminal link between Kirk and Moskowitz.

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[5] It was Kirk not Moskowitz, who went to Hong Kong and started negotiations with Kaiwa that resulted in what the government called the "sham $12 million purchase order," one of the three main prongs of the evidence (quoted above) recited by this Court on direct appeal. After bragging to Moskowitz that he [Kirk] would consummate the deal, Kirk arranged the travel by Kaiwa executives to Ferro's New Hampshire Headquarters for the deal's formal consummation. Once there, Kirk claimed that he finalized the negotiations and told Moskowitz that Kaiwa had committed to the $12 million purchase order. Moskowitz announced it, he testified, believing it was true. Kirk's testimony would have allowed counsel to force him to admit his role and Moskowitz's reliance on it, so that Moskowitz could argue that his announcement was not fraudulent, since it was not "known at the time to be untrue by the person making it [i.e., Moskowitz.]" [Tr. 6716.]

Moskowitz's trial counsel actually greatly aggravated the import of Kirk's hearsay plea allocution that was allowed into evidence. First, he chose to reject the court's invitation to redact from the Kirk plea allocution Kirk's statement that he had conspired with "an officer," an invitation the court made to avoid any uncross-examined, Bruton-type finger-pointing by a confessing coconspirator. Then, counsel expressly opened the door to just such uncross-examined finger-pointing by trying to convince the jury that the "officer" referred to in Kirk's plea was Steve Morin, when there was no evidence at all to support that argument. The court again blew up at him:

> PROSECUTOR: Counsel argued pretty substantially on the basis of the Kirk plea, indeed almost left the jury with the impression that it specifically named Steve Morin ...
>
> THE COURT: That was an outrageous argument. It was an absolutely outrageous argument, totally contra to what you know took place.
>
> COUNSEL: No, Judge, I don't know what you are talking about ...
>
> THE COURT: Oh, stop it. [Tr. 6635-6638]

The District Court then allowed the government to rebut with the argument that the officer was not Morin. This clearly allowed the jury to focus on who the officer actually was. It was not Morin, as the court had correctly noted. This left only Moskowitz and everyone knew it. The prosecutor drove

Moskowitz's identity home at the very end of his rebuttal closing argument when he told the jurors: "look at the guilty plea" and in particular focus on the language about "an officer of the company." [Appellate Appendix, at 1082-84.]

If more is needed to show the prejudicial mistakes made in relation to Kirk, one last mistake drives home the point that counsel was completely ineffective at using the rules to present any Kirk-related helpful evidence. Using Evidence Rule 608 as his supposed authority, counsel tried to have Moskowitz' character witnesses testify about specific actions of Kirk's past misconduct, hoping that this would allow the jury to hear the details of Kirk's past attempts to dislodge past superiors by false accusations against them. He was slammed once again by a trial court simply incredulous at his ineptitude:

> The Court: I assume were under 608? Counsel: Yes. The Court: That's all. Counsel: Can I go into his management style? The Court: No. Counsel: I think that is relevant to this case. The Court: No. Counsel: And the court also indicated earlier that I could not go into specific instances? The Court: Correct.
> Counsel: Even though it might bear on his truthfulness and untruthfulness?
> The Court: ... It can't be done by the person who calls the witness.
> Counsel: There is no way of getting into reputation or opinion?

> The Court: You can get into both the reputation and opinion, as to truthfulness or untruthfulness ...
> Counsel: You just told me I couldn't do that.

[Tr. 5249-5250.] This is surely substandard, particularly as the last gasp at discrediting a key witness who was allowed to testify by hearsay because of counsel's initial ineffectiveness.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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Dated: May 19, 2005

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APPENDIX A

S.D.N.Y.
01-cv-10644
97-cr-1122
Mukasey, C.J.

United States Court of Appeals
For The
SECOND CIRCUIT

At the stated Term in the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 18th day of Feb. two thousand and five,

Present:

Hon. Amalya L. Kearse,
Hon. Robert D. Sack,
Hon. Sonia Sotomayor,
Circuit Judges.

Ronald Moskowitz,
Petitioner-Appellant,

v. 04-4481-pr

United States of America,
Respondent-Appellee.

Appellant, through counsel, moves for a certificate of appealability. Upon due consideration, it is ORDERED that the motion is DENIED and the appeal is DISMISSED. The appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c).

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: /s/

FEB 18 2005

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RONALD MOSKOWITZ,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

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01 Civ. 10644 (MBM)

OPINION AND ORDER

APPEARANCES:

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MICHAEL B. MUKASEY, U.S.D.J.

This petition pursuant to 28 U.S.C. § 2255 (2000), whereby Ronald Moskowitz seeks to vacate the judgment of conviction entered against him on the ground that his trial counsel was ineffective, is here on remand from the Court of Appeals after this court relied in part on Billy-Iko v. United States, 8 F.3d 111 (2d Cir. 1993), in denying Moskowitz's claims to the extent they were based on the trial record because he had not raised those claims on direct appeal. See Moskowitz v. United States, 01 Civ. 10644 (MBM), 2002 WL 31119269, *2 (S.D.N.Y. Sept. 24, 2002). The holding in Billy-Eko that record-based ineffective assistance claims must be raised on direct appeal or waived, absent a showing of cause, if the defendant is represented on appeal by a lawyer other than the one who represented him at trial, was rejected by the Supreme Court in Massaro v. United States, 538 U.S. 500, 509 (2003). Accordingly, I have been directed to rule on the merits of Moskowitz's record-based claims. For the reasons set forth below, those claims lack merit, the requested relief is again denied and the petition is dismissed. No certificate of appealability will issue.

Familiarity with the court's prior opinion in this case is assumed for current purposes. That opinion, which includes a section summarizing the proof at trial and includes also the conclusion of the Court of Appeals on Moskowitz's direct appeal that that proof shows "direct and overwhelming evidence of Moskowitz's guilt," United States v. Moskowitz, 215 F.3d 265, 270

(2d Cir. 2000), is incorporated herein by reference.

A defendant who presses a claim of ineffective assistance assumes a formidable two-part burden. He must, first, "show that counsel's performance fell below an objective standard of reasonableness" under "prevailing professional norms," and, second, "affirmatively prove prejudice" – which is to say, he must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 687-89, 693-94 (1984). To satisfy the first part of that test, the defendant must show that his lawyer "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Id. at 687.

Here, "[a]ctions or omissions by counsel that might be considered sound trial strategy do not constitute ineffective assistance." United States v. Best, 219 F.3d 192, 201 (2d Cir. 2000) (internal quotation marks omitted). A court should not "second-guess trial counsel's defense strategy simply because the chosen strategy has failed." United States v. DiTommaso, 817 F.2d 201, 215 (2d Cir. 1987). Therefore, a court faced with an ineffective assistance claim "'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' bearing in mind that '[t]here are countless ways to provide effective assistance in any given case' and that '[e]ven the best criminal defense attorneys would not defend a particular client in the same way.'" United States v. Aguirre, 912 F.2d 555, 560 (2d Cir. 1990) (quoting

Strickland, 466 U.S. at 689). The reviewing court's focus should be on the "fundamental fairness of the proceeding whose result is being challenged," with the emphasis not on grading counsel's performance but on "whether . . . despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." Strickland, 466 U.S. at 696. "When a true adversarial criminal trial has been conducted -- even if defense counsel may have made demonstrable errors -- the kind of testing envisioned by the Sixth Amendment has occurred." United States v. Cronic, 466 U.S. 648, 656 (1984).

Even if a defendant establishes that trial counsel's performance was deficient by the standards articulated above, he cannot prevail on his claim of ineffective assistance unless he shows also that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "Reasonable probability," in this context, means "a probability sufficient to undermine confidence in the outcome." Id.

In his Supplemental Brief, as in his initial memorandum of law, Moskowitz advances essentially two categories of argument. The first category comprises trial counsel's alleged failures in dealing with a variety of issues relating to codefendant Jan Kirk, and in presenting a requested jury instruction. These are relatively straightforward, and can be treated briefly.

With respect to Kirk, Moskowitz proceeds from a premise that is itself incorrect -- that "Kirk was the proven wrong-doer and that the case against Moskowitz was co-conspirator derivative of that guilt" (Moskowitz Supp. Br. at 16) -- to the necessarily erroneous conclusion that any purported error in connection with evidence relating to Kirk must have been catastrophic. Here, Moskowitz omits reference to evidence of his having (i) parked stock in his family trust and sold it without public disclosure, (ii) dealt directly with Jerome Allen, who wrote favorable articles about Ferrofluidics in return for under-priced warrants issued based on back-dated minutes (Tr. 1582-87, 1608-26), and (iii) arranged to pay a supposedly independent stock analyst through a third party in return for a favorable report, then urged that analyst, Sheldon Traube, to deny falsely Fortune Magazine that he had been paid, and then himself lied to the company's board in order to conceal the payment (Tr. 646, 1574-75, 3917-31, 4483-84, 4520-24, 4530-33). These misdeeds were carried out with no apparent assistance from Kirk. He also fails to grapple with the logical flaw in his reasoning, which arises from the simple fact that Moskowitz was the main beneficiary of all the frauds that went on at Ferrofluidics, whether they were orchestrated principally by Kirk, as were the sham private placements and the sham Kaiwa invoice, or principally by Moskowitz himself, as were the frauds referred to above.

Sidestepping those significant gaps, Moskowitz taxes his lawyer for having failed to agree to omit from the Kirk guilty plea a reference to an unnamed employee with whom he conspired, and

then having tried to suggest in summation that that employee was Steve Morin. The government was permitted to neutralize that suggestion, which had no basis in the record, by simply pointing out that it had no basis in the record, and that the employee was not identified. No suggestion was permitted, nor was any made, that the employee was Moskowitz. Counsel's approach to the Kirk plea apparently was strategic. That the strategy did not succeed does not mean that counsel was ineffective for having pursued it, particularly when the result, although it did not help Moskowitz, did not result in significant harm either.

In a footnote, Moskowitz also hypothesizes that trial counsel could have sought to "require the government to grant immunity to Kirk for the defense, given how many grants of immunity the government used to make its case." (Moskowitz Supp. Br. at 19 n.12). That hypothesis is without legal foundation. "Absent extraordinary circumstances, 'the Due Process Clause imposes no requirement that defense witness immunity be ordered "whenever it seems fair to grant it."'" United States v. Diaz, 176 F.3d 52, 115 (2d Cir. 1999) (quoting Blissett v. Lefevre, 924 F.2d 434, 441 (2d Cir. 1991) (quoting United States v. Turkish, 623 F.2d 769, 777 (2d Cir. 1980). Instead, the standard is as follows:

> We apply a three-part test for determining whether there are exceptional circumstances warranting a directive that the government grant immunity to a defense witness. First, the district court must find that the government, through its

> own overreaching, has forced the witness to invoke the Fifth Amendment or, that the government has engaged in discriminatory use of grants of immunity to gain a tactical advantage; second, the witness' testimony must be material, exculpatory and not cumulative; and third, the defendant has no other sorce to obtain the evidence. The defendant bears the burden of showing that each of these elements is present.

Id. (citations omitted). That standard simply was not been met here. There is no claim that the government put Kirk in the position of invoking his Fifth Amendment rights; Kirk pleaded guilty. Nor is there any suggestion of government misconduct in connection with conferring immunity on anyone. Further, there has been no showing that Kirk had "material, exculpatory" testimony to offer. Pipe dreams about what Kirk might have testified to, or what he could not have denied, as contained in Moskowitz's initial memorandum (Moskowitz Mem. at 28) do not amount to such a showing, and could not have undercut the substantial evidence of Moskowitz's own wrongdoing. Material testimony, it must be recalled, is testimony that does more than "bear[ ] some abstract logical relationship to the issues in the case"; rather, it is testimony that would permit a defendant "significantly to alter the quantum of proof in his favor." United States v. Maniktala, 934 F.2d 25, 28 (2d Cir. 1991) (citation omitted). Thus, if trial counsel had moved to compel immunity for Kirk, that application would have been denied.

Insofar as Moskowitz complains about his trial counsel's failure to preserve a request for a jury instruction on the subject of predictions or forecasts as contrasted with representations of current fact, as the Court of Appeals pointed out in its opinion on Moskowitz's direct appeal, "[i]t is hardly clear that Moskowitz's draft charge accurately represented the law in every respect." Moskowitz, 215 F.3d at 271 (quotation and citation omitted). Nor was there any prejudice to Moskowitz from the failure to give this instruction in view of "the substantial evidence that Ferro's current books misrepresented its financial condition." Id. at 272 (emphasis in original).

The second category of arguments consists of excerpts from the trial record yielded by dredging the transcript of a hard-fought 12-week trial for passages that reflect exchanges between defense counsel and the court in which defense counsel either did not accomplish what he wished or apparently was criticized, whether implicitly or explicitly, by the court. (Moskowitz Supp. Br. 17-20, Ex. B at 1-16) What is notable about this omnium-gatherum is that these passages are presented without context. When quotations are offered, what appears is a brief exchange, featuring principally the court's statements. In addition to quotations, Moskowitz offers a statistical rundown of the number of defense objections made and sustained as compared with the number of prosecution objections made and sustained. (Moskowitz Supp. Br. Ex. B at 17-32) These statistics establish the unremarkable fact that a higher number and proportion of defense objections than prosecution objections were overruled, and a higher number and proportion of

prosecution objections than defense objections were sustained.

As I noted in the earlier opinion, there is acerbity evident in many of the exchanges between the court and counsel, but neither individually nor collectively do these exchanges betray ineffective defense representation. In some instances, Moskowitz has simply misread what happened. Thus, he quotes the court ending a discussion with "here endeth the lesson" (Moskowitz Supp. Br. Ex. B at 1, quoting Tr. 191), suggesting that Moskowitz's trial counsel was being given a tutorial in the law of evidence. In fact, the comment related to a prior ruling that the court was explaining, and the comment was a self-deprecating one by the court about the court's own voluable explanation. Moreover, the longer discussion ended with defendant's trial counsel getting the ruling he wanted. (Tr. 201) Further, the court's restatement of questions to witnesses is presented as a criticism of the questioner, when in context it is a direction to the witness to answer the question. (Compare, Moskowitz Supp. Br. Ex. B at 3-4, with, Tr. 1159, 1160, 1163, 1168, 1241) Indeed, at one point the court expressed displeasure not with defense counsel but with Moskowitz himself insofar as he was offering responses that went far beyond counsel's questions. (Moskowitz Supp. Br. Ex. B at 14)

In other instances, the court asked counsel to move things along, an admonition that is the small change of daily discourse during a lengthy trial. Indeed, a couple of the examples cited by Moskowitz were directed at both sides. (Moskowitz Supp. Br. Ex. B at 4, citing Tr. 1412,

and 9, citing Tr. 2259) One could cite similar admonitions to government counsel alone (see, e.g., Tr. 3649), but the point is a small one by any standard.

It would lengthen this opinion beyond what is necessary or useful to take each of the dozens of transcript excerpts Moskowitz offers and explain in detail what actually happened at each point. Neither individually nor collectively do they establish that defense counsel failed to provide the representation contemplated by the Sixth Amendment. Styles of advocacy differ. The defendant in a criminal case can always appeal a verdict adverse to him; the double jeopardy clause of the Fifth Amendment bars the government from appealing a verdict adverse to it. As a result, some defense lawyers are aggressive and try to score whatever points they can with the jury. Whether or not they are in full compliance with the rules in doing so. It is up to the court to try to keep what happens before the jury within the lines that the court believes the rules establish. That tension is sometimes manifested in exchanges of the sort catalogued by Moskowitz. Such exchanges are not in themselves evidence of ineffective assistance.

Nor are the statistics Moskowitz cites, of objections made and either overruled or sustained, such evidence, for the same reasons cited in the preceding paragraph. My experience is that defense counsel often, although certainly not always, ask more objectionable questions and raise more unsuccessful objections than prosecutors. Once again, how far a defense lawyer will go in trying to press his own

examinations or limit the other side's is a matter of judgment and strategy.

For the reasons set forth above, Moskowitz's record-based objections to his trial counsel's performance do not establish that Moskowitz's was anything but a "true adversarial criminal trial." Cronic, 466 U.S. at 656. They certainly do not "undermine confidence in the outcome" of that trial. Strickland, 466.U.S. at 694. Therefore, the application to set aside the judgment of conviction is denied and the petition is dismissed.

For the above reasons, I believe that reasonable jurists could not dispute the result reached here, and accordingly no certificate of appealability will issue.

SO ORDERED

/s/
Michael B. Mukasey
U.S. District Judge

Dated: July 15, 2004
New York, New York

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RONALD MOSKOWITZ,	:
	:
Petitioner,	:
	:
-against-	:
	:
UNITED STATES OF AMERICA,	:
	:
Respondent.	:

01 Civ. 10644 (MBM)

OPINION AND ORDER

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MICHAEL B. MUKASEY, U.S.D.J.

Ronald Moskowitz was convicted of securities fraud and conspiracy to commit various securities fraud offenses following a 12-week jury trial; his conviction and sentence were affirmed on appeal, where he was represented by counsel other than the one who had represented him at trial. United States v. Moskowitz, 215 F.3d 265 (2d Cir. 2000). He petitions now pursuant to 28 U.S.C. § 2255 to set aside the judgment of conviction, arguing that he did not receive effective assistance of counsel at trial, and that the 97-month sentence imposed on him violates Apprendi v. New Jersey, 530 U.S. 466 (2000). Moskowitz's claims of ineffective assistance fall into two categories: claims based on the trial record, and claims arising outside that record. The claims arising outside the record center on trial counsel's failure to meet with one of the government's witnesses -- Alvan Chorney -- so as to be able to elicit testimony that would have helped Moskowitz, and his failure to call as a defense witness one of Moskowitz's principal co-conspirators, Jan Kirk, who had pleaded guilty but who had not yet been sentenced at the time Moskowitz was tried. The government sought to call Kirk as a witness, but Kirk, through counsel, invoked his Fifth Amendment rights. As a result, the government was permitted to introduce a redacted version of Kirk's guilty plea. Moskowitz attacked anonymous letters that Kirk sent to the SEC, in which Kirk sought to cast blame for numerous Ferro-related frauds on Moskowitz, and deflect it from himself. (GX 3502-25)

For the reasons set forth below, the requested relief is denied and the petition is dismissed.

I.

As summarized by the Court of Appeals, the proof at trial showed the following:

> Moskowitz was Chief Executive Officer and [Jan] Kirk Chief Financial Officer of Ferrofluidics Corporation ("Ferro"). In the later 1980s, Moskowitz got into financial trouble and needed to sell off a sizable portion of his equity stake in Ferro. To that end, he parked his holdings in a "family trust," subdivided these trust holdings in a "family trust," subdivided these trusts holdings among his grandchildren to avoid SEC reporting requirements, and sold millions of shares of stock, a fact unknown to the Ferro's public shareholders or to the market generally.
>
> During this time, Moskowitz and Kirk execute a series of frauds designed to artificially inflate share prices, a fraud from which Moskowitz – as a seller of Ferro's stock – reaped the primary gains. Among these frauds were paying off an investment reporter and stock analyst to talk up the company; executing a sham private placement in which Moskowitz and Kirk found complicit or unknowing buyers who actually invested no capital in the corporation; executing a sham $12 million purchase order to inflate expectations; and

> falsifying public accounts to further these and other scams.

Moskowitz, 215 F.3d at 268. A part of the proof of payoffs to the investment reporter, Jerome Allen, consisted of evidence that Allen was granted Ferro warrants at prices substantially below market, and that bogus Ferro Executive Committee minutes were created to show that the warrants had been granted earlier than they in fact were, when Ferro stock was trading at lower prices. Alvan Chorney, a Ferro vice president and one of the members of the Executive Committee, testified that warrants were not granted to Allen at the meetings reflected in the bogus minutes, and that meetings did not even occur on certain of the dates appearing on those minutes. (Tr. 1582-87, 1608-26) Chorney testified so that the report of the stock analyst, Sheldon Traube -- referred to at trial as the Dickinson Report after the company that published it (GX 300) -- included projections based on the most aggressive calculations Chorney could produce after being instructed by Moskowitz to revise his own projections upward, and were so aggressive as to be unlikely. (Tr. 1540-45, 1551-54) The Dickinson Report was supposed to be an independent publication, and was proclaimed loudly as such by Moskowitz to investors and the financial world. However, Chorney and other witnesses testified that Moskowitz arranged to pay Traube through a third party for his favorable report on Ferro, and then urged him to lie to Fortune Magazine about whether he had been paid; Moskowitz himself lied to the Ferro board to

conceal the payment. (Tr. 646, 1574-75, 3917-31, 4483-84, 4520-24, 4530-33)

Moskowitz's principal argument on appeal was that this court erred when it received in evidence Kirk's guilty plea.

...

result of the exchanges he cites – i.e., that the alleged errors of counsel in his interaction with the court had "an adverse effect on the defense" such that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 693-94 (1984). Even if Moskowitz had made an issue of these exchanges on direct appeal, they do not come anywhere near showing that trial counsel's performance fell below "an objective standard of reasonableness" under "prevailing professional norms." Id. at 687-88.

For the above reasons, Morkowitz's record-based claims of ineffective assistance are barred.

II.

Moskowitz argues that if his attorney had interviewed Alvan Chorney, he would have discovered that Chorney had "very helpful" testimony to offer. (Moskowitz Mem. At 9) This testimony, as presented in Moskowitz's hearsay account of what Chorney allegedly told him after the trial, was that Chorney believed that Moskowitz was both familiar with the marketing possibilities for Ferro's products than Chorney, and "determined to make the most favorable projections come true." (Moskowitz Decl. ¶ 7) Further, Chorney allegedly would have said that

Moskowitz "was honest," and "would not purposely deceive anyone." Id.

Here, Moskowitz appears to overlook four significant points. First, although Chorney might have been permitted to present his personal view that Moskowitz was honest, such testimony likely would have been halted far short of what Moskowitz seems to be proffering: Chorney's articulated belief that Moskowitz did not have the intent to commit the crimes charged in the indictment. Cf. United States v. Hauert, 40 F.3d 197, 202 (7th Cir. 1994) (proper to exclude lay witness opinion as to tax protester's state of mind).

Second, Moskowitz's lawyer actually did elicit some of the proffered testimony, including that Moskowitz said he was committed to achieving the numbers he had gotten Chorney to project. (Tr. 1553, 1559)

Third, if Chorney had given character testimony of the sort now proffered by Moskowitz -- including an endorsement of Moskowitz's honesty -- such testimony would have been undercut by Chorney's own testimony that minutes reflecting grants of warrants to Jerome Allen contained descriptions of events that did not occur.

Fourth, the fraud relating to Chorney's projections was not limited to the projections themselves; but extended to their use in the Dickinson Report, which was supposed to be an independent report but whose author -- Traube -- was paid by Moskowitz through a third party, as outlined above. The fraud consisted of concealing that payment from the investing public. Even accepting Moskowitz's proffer of Chorney's

testimony at fact value, it does not touch that aspect of the fraud.

In sum, there could have been no prejudice to Moskowitz from a failure to elicit favorable testimony from Chorney.

IV.

Moskowitz's final ineffective assistance of counsel claim arises from the failure to call Kirk as a witness. Here, Moskowitz laces his ineffective assistance argument with a suggestion that the government purposely assured that Kirk would not be available by arranging to postpone Kirk's sentencing until Moskowitz's trial was over, and then failed to seek immunity for Kirk so as to prejudice Moskowitz's defense. Moskowitz presents two items of information outside the trial record in support of this claim; first, Moskowitz's own averment that he had urged his lawyer to call Kirk (Moskowitz Decl. ¶ 6); second, two letters from the court file in United States v. Kirk, 97 Cr. 1032, both addressed to Judge Robert W. Sweet of this court, to whom Kirk's case initially was assigned, in which the government and Kirk's counsel jointly sought to adjourn Kirk's sentencing. That sentencing was first scheduled to take place during the third week of Moskowitz's trial.

Moskowitz's claim relating to his lawyer's failure to call Kirk fails for numerous reasons, of which the following are the most obvious:

First, the claim is based principally on the trial record, the failure to call Kirk being evident from that record. Moskowitz failed to raise this claim

on appeal, and therefore it is barred for the reasons discussed at pages 4-5 above.

Second, the postponement of Kirk's sentencing was entirely unremarkable. As originally scheduled, it would have taken place during Moskowitz's trial, which would have required diversion of resources and attention to meet the issues that Kirk raised in connection with his sentencing -- issues treated by the Court of Appeals in the same opinion that affirmed Moskowitz's conviction and sentence. See Moskowitz, 215 F.3d at 272-73. Even if that sentencing had gone ahead as scheduled, Kirk would have retained his Fifth Amendment privilege so long as he had issues to press on appeal, as he in fact did. See United States v. Gjerde, 110 F.3d 595, 603 (8th Cir. 1997) (witness who "had asserted his Fifth Amendment right against self-incrimination pending his appeal" was unavailable); United States v. Duchi, 944 F.2d 391, 394 (8th Cir. 1991) (it is the "better rule" that a Fifth Amendment right to remain silent "continues until the time for appeal has expired or until the conviction has been affirmed on appeal"); Prentice v. Hsu, 280 F. Supp. 384, 388 (S.D.N.Y. 968) (witness in civil case could assert his Fifth Amendment right to remain silent while his appeal from his criminal conviction was pending). Those issues, including whether Kirk had abused a position of trust, went to the heart of any testimony that Kirk could have given.

Third, Moskowitz's suggestion that Kirk's testimony somehow could have helped his defense is simply fanciful. Among the exhibits Moskowitz introduced at trial were four letters Kirk sent to the SEC in which he sought to lay

blame for numerous Ferro-related frauds on Moskowitz and to deflect it from himself. (GX 3502-25) Moskowitz appears to argue that if Kirk had done that on the witness stand, the jury -- aware of Kirk's own wrongdoing toward Moskowitz and otherwise -- would have found it impossible to believe that Moskowitz had conspired with Kirk:

> I believed that if a jury heard all the ways in which Jan Kirk had tried to hurt me by spreading falsehoods, and that he had done this very same thing in his past two jobs before coming to Ferro, jurors may well have doubted that I had conspired with him to do anything.

(Moskowitz Decl. ¶ 6) In essence, Moskowitz is arguing that if his attorney had managed to call Kirk, and if Kirk had been forced to testify, he would have been what the government describes aptly as a "loose cannon" (Gov't Mem. at 63), but one that would miraculously have shelled the government's case and not Moskowitz's. That is simply speculation fueled by wishful thinking, and cannot provide the basis for a claim that trial counsel's failure to do the impossible and the inadvisable by calling Kirk as a defense witness prejudiced Moskowitz's defense.

For all of these reasons, there is no substance to Moskowitz's claim that his trial counsel's failure to call Kirk was a failure to provide Moskowitz with effective assistance.

V.

Moskowitz acknowledges that governing authority in this Circuit would defeat his claim that his sentencing violated Apprendi because the court rather than the jury fixed the Sentencing Guidelines range. He says that he presses this argument solely to create a record so that he can seek a reversal of fortune before the Supreme Court. (Moskowitz Mem. at 36-38) There is nothing to be done by this court other than to agree that governing authority forecloses Moskowitz's argument, see, e.g., United States v. Garcia, 204 F.3d 180, 183 (2d Cir.) ("We see nothing in the [Supreme] Court's holding in Apprendi or its explication of the holding that alters a sentencing judge's traditional authority to determine those facts relevant to selection of an appropriate sentence within the statutory maximum . . . ."), cert. denied, 533 U.S. 960 (2001), and to deny relief.

* * *

For the foregoing reasons, the relief Moskowitz seeks is denied, and the petition is dismissed. For the same reasons, Moskowitz has not made a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2). Accordingly, no certificate of appealability will issue.

SO ORDERED

/s/
Michael B. Mukasey
U.S. District Judge

Dated: New York, New York
September 23, 2002